

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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:  
SOKOLOW, et al, : 04-CV-397 (GBD)  
:  
Plaintiffs, : April 4, 2013  
:  
v. : 500 Pearl Street  
: New York, New York  
PALESTINE LIBERATION ORGANIZATION, et al, :  
:  
Defendants. :  
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TRANSCRIPT OF CIVIL CAUSE FOR RULE 11 MOTION  
BEFORE THE HONORABLE RONALD L. ELLIS  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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1 THE COURT: Good morning. This is Judge Ellis.  
2 Could I have your appearances beginning with the plaintiff?

3 MR. TOLCHIN: Good morning, Your Honor. Robert  
4 Tolchin for the plaintiff.

5 MR. HILL: Good morning, Your Honor. Brian Hill and  
6 Marco Roshan for the defendants.

7 THE COURT: This is a conference in Sokolow v.  
8 Palestine Liberation Organization, et al., Case 04-CV-397. It  
9 is Thursday, April 4<sup>th</sup> at approximately ten a.m.

10 The conference was called to address the defendant's  
11 request to file a motion for sanctions concerning certain  
12 paragraphs in the plaintiff's complaint.

13 Before I address that, the defendants have made an  
14 application for an extension of time to file liability expert  
15 reports based on the additional time for the plaintiffs to --  
16 that was granted for plaintiffs to file a limited number of  
17 reports that were not ready. I should -- I'll just advise  
18 defendants that their letter will be so ordered and they will  
19 be granted the additional time.

20 MR. HILL: Thank you, Your Honor.

21 THE COURT: Now, as to this question of whether or  
22 not it makes sense to file a Rule -- a motion under Rule 11  
23 for the paragraphs that are in dispute, let me first say that  
24 with respect to the allegations in the complaint one, the  
25 plaintiffs may assert affirmatively that they do not intend to

1 pursue the allegations and -- so as to going forward it seems  
2 to me that the requirement to strike them is unnecessary under  
3 the rule.

4           With regard to the question of whether or not  
5 there's a question concerning the putting in of the  
6 information in the beginning, the defendants -- I mean the  
7 plaintiffs assert that the information relied on is privileged  
8 and certainly that is something that a party can do in terms  
9 of putting information in a complaint or any other pleading.  
10 That of course would require the court to review the  
11 information that is produced in order to determine whether or  
12 not it formed a good faith basis for the inclusion in the  
13 complaint.

14           So the practical impact of going forward with the  
15 motion is that I don't know that it would require the  
16 plaintiff to strike it if it's clear and unequivocal that they  
17 do not intend to pursue the particular aspects -- factual  
18 assertions that are in dispute and secondly, if there's a  
19 challenge to the placing of information in the first place  
20 that would require the court to do an in camera inspection of  
21 the evidence presented by the plaintiffs. So just on the  
22 strict practical matter it seems to me that given where we are  
23 I'm not sure that this will have any particular salutary  
24 effect for the case.

25           MR. HILL: Your Honor, this is Brian Hill. May I be

1 heard briefly?

2 THE COURT: Before you do that you might want to hear  
3 what I have to say about the legal issue.

4 MR. HILL: Go ahead, Your Honor.

5 THE COURT: This was precipitated in part because the  
6 plaintiffs had included Abu Halawa in the provisions of the  
7 complaint that are being challenged. After reviewing the  
8 portions of the complaint that are at -- that are in dispute I  
9 would note for the parties that the gist of the -- that there  
10 are two things that are included in those portions. One, it  
11 is true that Abu Halawa is named individually and certainly  
12 pursuing him as an individual would be problematic. But  
13 overall those portions of the complaint are addressed not at  
14 that individual, although he was specifically named, but that  
15 he and other John Does were acting on behalf of the PLO and  
16 the PA and whether or not Abu Halawa is stricken, whether or  
17 not he is the individual named it does not change the  
18 essential nature of the complaint which is that these actions  
19 done by these John Does whether -- indeed if the complaint did  
20 not name anyone individually it would not change the essential  
21 character of the allegations of the plaintiffs which is that  
22 these actions were done within the scope of the -- those  
23 agents, agency and employment by the PLO that they were done  
24 on the direction and control of the PLO and the PA.

25 So as a legal matter I don't understand really where

1 we would be going if these -- if we were to strike any  
2 particular individual and I don't think even -- though I  
3 thought that the evidence about Abu Halawa was insufficient  
4 and should not go forward as I said even given -- even if I  
5 take that into effect I don't think that would mean that the  
6 entire provisions would be stricken because the provisions do  
7 not depend on the naming of a particular individual.

8 Now, Mr. Hill, you may respond to all of that.

9 MR. HILL: Thank you, Your Honor. I'll start at the  
10 end if I may.

11 THE COURT: Yes.

12 MR. HILL: I think there's a fundamental difference  
13 in the way that the parties are viewing the motion. The  
14 intent of our motion was not to strike the words Abu Halawa  
15 from the complaint. The relief we are seeking is in fact  
16 striking the entire content of the paragraph.

17 THE COURT: I understand that and that's why the last  
18 part I mentioned because I'd like you to address why -- as I  
19 said, this all came -- this all started when it seemed that  
20 the basis for putting Abu Halawa --

21 MR. HILL: Halawa is how I say it, Your Honor.

22 THE COURT: Putting -- the court indicated that the  
23 basis for having him in was not supported.

24 MR. HILL: Right.

25 THE COURT: But I understood you to be wanting to

1 strike the entire provisions but I did not find that his name  
2 was an essential element of the overall allegations as I read  
3 them.

4 MR. HILL: I agree with the court and that's why Mr.  
5 Tolchin's response that they will withdraw Abu Halawa from the  
6 equation is insufficient. The fact of the matter is that we  
7 went through 18 months of fact discovery and the plaintiffs  
8 produced no evidence that anyone associated with either  
9 defendant was involved in the attack on the Guettas. We asked  
10 for that information at the depositions. We asked for  
11 documents from the plaintiffs and they produced no evidence at  
12 all until -- well, we'll get to whether or not the subsequent  
13 identification is or isn't admissible evidence.

14 So we got through December 21<sup>st</sup> with no evidence and  
15 with an admission from the plaintiffs in a letter to Your  
16 Honor that if the -- one of the plaintiffs could not make an  
17 eyewitness identification of one of the shooters they had no  
18 case. So the relief we're seeking is not just to get rid of  
19 Abu Halawa. It's to get rid of all of these allegations  
20 because in our view they lack any evidence.

21 Now, the response we got from the plaintiffs was at  
22 the time we made the complaint we had privileged information  
23 indicating Abu Halawa was involved. Your Honor, we have  
24 received no privilege log describing this privileged  
25 information. The allegedly privileged information cannot come

1 from either of the percipient witnesses because we have  
2 deposed them both and they have both said that they did not  
3 know who did it. So this allegedly privileged information on  
4 which the case was allegedly based cannot be an attorney-  
5 client communication and it has not been logged.

6           So to return to the question about how did we get  
7 here with the case. We are extremely troubled that we have  
8 been through all of this litigation and the plaintiffs have  
9 now produced no evidence to the court their underlying  
10 allegations. They have claimed it is privileged. They have  
11 not produced a privilege log and I would respectfully request  
12 what Your Honor suggested which is that they be required to  
13 submit that material in camera to you so you can make a  
14 determination about whether there was a good faith basis for  
15 bringing the lawsuit against these parties in the first place.

16           So let me then transition to where we are now.  
17 After we sent the Rule 11 letter in January suddenly we got an  
18 email from Mr. Tolchin shortly before his response to the Rule  
19 11 letter was due claiming that Mrs. Guetta had identified the  
20 photograph of someone Mr. Tolchin attached to his email and  
21 said was a former employee of ours who is now deceased. We  
22 have no sworn testimony as to this identification. This  
23 identification was given to us after the close of fact  
24 discovery and it appears to us to be an act designed to avoid  
25 the very relief we're seeking here. We simply think it is

1 inappropriate for a plaintiff to file a case without at least  
2 substantiating that they had a basis for it in the first  
3 place, go through 18 months of fact discovery, produce no  
4 evidence at all to support the allegation and then after  
5 discovery is closed when they have received a Rule 11 letter  
6 and are within the safe harbor to provide us with an unsworn  
7 alleged eyewitness identification of a stranger to a crime  
8 that took place 12 years earlier. We are confident based on  
9 what Your Honor has said before that this identification  
10 cannot be admitted at trial in this case.

11 THE COURT: Okay.

12 MR. HILL: I know we're not to admissibility yet.

13 THE COURT: But, again, just to be clear, and I may  
14 be stating this more broadly than I intended. It really  
15 doesn't matter to me about the specific identification of Abu  
16 Halawa because to me the thing that I would be interested in  
17 is whether or not there's a good faith basis for the claims  
18 against the PLO and the PA, not who was involved in -- not  
19 that the John Does or the individuals involved because the  
20 issue as I see it is whether or not the action of the  
21 individuals whether they were identified or not can be imputed  
22 to the PLO and the PA. So if anything I wouldn't be  
23 particularly interested in the identification because I gather  
24 that whatever the identification was for this person, how bad  
25 it was or how good it was you might as a lawyer rely on that.



1 But from a legal point of view, and I said this --  
2 this is not a factual dispute to me. This is a legal dispute  
3 as to whether or not the allegations linking the PLO and the  
4 PA to the actions of these individuals had support -- it could  
5 be an allegation in the complaint.

6 MR. HILL: Your Honor, let me make two points and  
7 then I think I will have said all I wish to say without  
8 hearing from you further or Mr. Tolchin.

9 I'm focusing on the identification of Mr. Maurar  
10 which was given to us for the first time in February of this  
11 year because that is literally the only evidence linking the  
12 PA and the PLO to this crime. There is not --

13 MR. TOLCHIN: That's not true.

14 MR. HILL: Well, you'll get your chance, Mr. Tolchin.

15 There is not a document that indicates who did this  
16 or how they might have been connected to the PA or the PLO.  
17 The only link in this chain is this eyewitness identification  
18 and, Your Honor, I submit that that's exactly what the  
19 plaintiffs told you last fall when they were trying to get  
20 photos of people associated with my client so they could show  
21 them to their client in the hope that their client would pick  
22 someone. What had happened is Your Honor denied that because  
23 you said look, that's not going to be admissible.

24 But they went ahead and found a picture of somebody  
25 they say is associated with us and showed it to her and she

1 said that that's the person now but that is it, Your Honor.  
2 There is not a single document indicating who did this crime  
3 or that the PA or the PLO had anything to do with this crime.  
4 That's it. It's just this ID.

5 I want to make this point about filing the case in  
6 the first place. Everyone seems to agree, and the plaintiff  
7 is frankly estopped from denying this, that she did not make  
8 an identification of Mr. Maurar until after discovery closed  
9 in the case. So this complaint was filed in 2004 without this  
10 supposed eyewitness identification of Mr. Maurar on which the  
11 plaintiffs are now relying.

12 So as I said before, I do think it's entirely  
13 appropriate and I would urge the court to do so, to require  
14 the plaintiffs to produce to the court whatever information  
15 they had at the time they filed this complaint that they  
16 believe provided a good faith basis for these factual  
17 allegations because we believe in all candor, Your Honor, that  
18 there is none.

19 THE COURT: Mr. Tolchin.

20 MR. TOLCHIN: Thank you, Your Honor. I'll start from  
21 a different point. I agree with Your Honor completely that  
22 the identification of Abu Halawa is a tree and it's just a  
23 tree within the forest. The larger picture is obviously  
24 regardless of whether it was Abu Halawa, this other individual  
25 that was identified or anyone who's been named as John Doe

1 whether they were sponsored, encouraged, aided, supported or  
2 employed by or an agent of the defendant. So I agree with  
3 that.

4           The issue about submitting materials for in camera  
5 review, I believe that the law has changed in that area. That  
6 used to be how things were done with the older version of Rule  
7 11. My understanding is that the safe harbor provision of  
8 Rule 11 which was enacted I think at least -- in the  
9 amendments at least 10 years ago provides that where defendant  
10 has made a Rule 11 motion -- where defendant based on an  
11 allegation it's frivolous the defendant -- it doesn't have to  
12 be a defendant. The party who thinks something is frivolous  
13 serves a notice on the other side and says I think it's  
14 frivolous and I'm going to file a Rule 11 motion unless you  
15 withdraw it. Once the other side withdraws it or declares  
16 that it's not going to pursue it then the issue of Rule 11 is  
17 over. There is no -- the entire meaning is safe harbor. The  
18 inquiry does not continue as to whether it should have been  
19 alleged in the first place.

20           So I don't think that -- I don't know if Your Honor  
21 meant to direct that that's how we would proceed or if Your  
22 Honor was saying that it doesn't matter because of the first  
23 issue that I mentioned.

24           THE COURT: Here's where I am so that you both  
25 understand. If the plaintiff's position is that they will not

1 be pursuing the claims that are in Paragraphs 55 through 58  
2 and 60 and you make that clear. I think that would comply  
3 with Rule 11 in the safe harbor. What's not entirely clear to  
4 me is -- because I think those claims that are in -- if you're  
5 going to use that as your safe harbor out that claim is not  
6 about Abu Halawa. That claim is about whether or not the  
7 incidents that are described by the John Does are attributable  
8 to the PLO and the PA which means that substituting somebody  
9 else in won't help those claims because you can't make them by  
10 substituting somebody for Abu Halawa.

11 So even if the witness identifies somebody  
12 afterwards if -- at that point you cannot pursue those claims  
13 because your safe harbor option was that you indicated that  
14 you would not pursue the claims. It's not just the claim  
15 related to Abu Halawa. It's all the claims that are in those  
16 paragraphs. As long as we understand that.

17 MR. TOLCHIN: So let me clarify what our intention  
18 is. We withdrew or we stated that we would not pursue the  
19 claim that Abu Halawa was involved in this attack. Not  
20 because I don't think he was, not because he wasn't a really  
21 bad guy who if he didn't do this attack did a lot of other  
22 attacks and was certainly sponsored by the defendants. Not  
23 because of any of that. That's just because of technicalities  
24 of truth and the sources of information that we had make it so  
25 that we are constrained to say that we will not pursue the

1 claim that Abu Halawa himself did this. However -- so that's  
2 only withdrawn under the safe harbor and the claim that the  
3 defendants --

4 THE COURT: What I'm saying to you is that I don't  
5 find that is an adequate safe harbor response.

6 MR. TOLCHIN: Let me finish if you don't -- I have  
7 more to say. May I?

8 THE COURT: Go ahead.

9 MR. TOLCHIN: The motion, the Rule 11 motion or the  
10 proposed Rule 11 motion that the defendants have served  
11 [inaudible] down to -- they say that plaintiff alleged that  
12 Abu Halawa did this and Abu Halawa worked for the defendants  
13 and therefore because we can't prove that Abu Halawa did it  
14 therefore the defendants have no liability. That's what they  
15 say.

16 We've withdrawn the claim that Abu Halawa did it and  
17 we have said that we intend to prove that the defendants have  
18 some liability here without proving that Abu Halawa did it.  
19 Now, what they're trying to do is move to dismiss. They're  
20 transforming -- transmogrifying a Rule 11 motion into a motion  
21 to dismiss or a motion for summary judgment. They've already  
22 moved for sum -- there have already been multiple motions  
23 addressed to the pleadings in this case and they're on the  
24 brink of the point where summary judgment motions will be the  
25 next step.

1           So what they're saying is they don't think we have  
2 proof that Abu -- that the defendants can be held liable for  
3 those attacks. The natural way to raise that is in a summary  
4 judgment motion. Other than this issue of Abu Halawa their  
5 motion, their proposed motion has not raised a Rule 11  
6 frivolous frivolity claim at all. The only thing they really  
7 addressed in their motion is this you can't prove a link to  
8 Abu Halawa and therefore we're off the hook argument.

9           So I believe that we are completely and totally  
10 within the safe harbor. We've withdrew the one specific thing  
11 that they complained about and everything else they're saying  
12 is a -- it's a wolf in sheep's clothing. It's a summary  
13 judgment motion dressed up as a Rule 11 motion putting the  
14 burden backwards being served with no exhibits, no  
15 attachments, no citations, no anything and being put in a  
16 posture that's prejudicial and for some reason puts this one  
17 particular issue which is really just one attack out of seven  
18 in this case for some reason on a different track -- on a  
19 different tack from all the others.

20           THE COURT: Well, I understood the defendant's  
21 argument to be that they have sought to find the link to the  
22 PLO and the PA in the allegations that are there, that the  
23 link appeared to be Abu Halawa and that was proved to be non  
24 existent or at least not provable at this point and that in  
25 the absence of some other link then the entire provisions

1 fall. I'm not exactly sure what's lurking in the wings. I  
2 understood them to be concerned that you're now going to try  
3 to establish a link by bringing in Maurar who has some link to  
4 PA and establish the link that way.

5 Now, if you have some other -- if you have some  
6 other basis for saying that all of these were authorized and  
7 solicited by the PLO and the PA other than the fact that one  
8 of the perpetrators or several of the perpetrators were either  
9 members of the PLO or the PA then I understand all the  
10 defendants are saying is we didn't see any other link. We  
11 tried to find another link and we challenge the entire  
12 provision because we think that the linchpin was Abu Halawa.

13 MR. TOLCHIN: Your Honor, it sounds like what you've  
14 just articulated is a summary judgment motion argument. If  
15 they think there's no evidence, if they think it can't be  
16 proven whether by -- there's many ways to skin a cat like this  
17 and I have an idea of the person who did it. You can have  
18 someone who --

19 THE COURT: Counsel, regardless of what it sounds  
20 like contention interrogatories often sound that way. If they  
21 ask you for -- I don't know everything that's happened in  
22 discovery but if they ask you for the basis for anything that  
23 was in those Paragraphs 55 through 58 and 60 and you didn't  
24 have anything then that certainly would be the basis for a  
25 Rule 11 questioning from them. So are you saying that they

1 never asked you about any of the allegations in these  
2 paragraphs?

3 MR. TOLCHIN: No, I'm not saying that, Your Honor,  
4 but Mr. Hill says to you there is no documents that proves it.  
5 Well, maybe there is no documents. Maybe we can prove it was  
6 an expert. Maybe we can prove if that's a pattern and  
7 practice that there were 400 other attacks of a similar nature  
8 at a similar place using the same modus operandi. There's  
9 many ways to prove it without necessarily having an ID of one  
10 of the attackers or without having a document. I don't know  
11 what document Mr. Hill thinks there might be. If he thinks  
12 there's a memo to terrorist headquarters saying carry out an  
13 attack today.

14 THE COURT: Mr. Tolchin --

15 MR. TOLCHIN: There's many different -- yes.

16 THE COURT: -- you're correct. It does not require a  
17 document. Indeed the fact that you alert that it's privileged  
18 could suggest that it's a conversation you had with somebody.

19 MR. TOLCHIN: Very correct.

20 THE COURT: But the important thing is that whatever  
21 basis there was existed at the time you wrote the complaint --  
22 as I said, it does not have to be in writing. I mean I did  
23 not ascribe to -- although Mr. Hill may have said there was no  
24 document, I don't think -- I wouldn't interpret that to be his  
25 position that the only support one could have for anything



1 that's in a complaint has to come from a written document.  
2 Otherwise we wouldn't be deposing people in cases.

3 MR. TOLCHIN: I think that kind of was his position.  
4 He said to Your Honor that there was -- that we've had all  
5 this discovery and he invokes the December 21<sup>st</sup> cutoff date,  
6 conveniently not reminding Your Honor that he produced far  
7 more discovery after the cutoff date than before but he says  
8 we've had no documents in all this discovery that speaks to  
9 this. That was his big argument. There's no documents.

10 MR. HILL: Well, Your Honor, let me just clarify if  
11 there's some confusion on the record here. I deposed both  
12 Mrs. Guetta and Mr. Guetta who were the only witnesses the  
13 plaintiffs identified as having knowledge of the attack. Mr.  
14 Guetta said he did not see the attackers. Mrs. Guetta said  
15 she saw the face of one of them but she did not know who he  
16 was. So unless there's another witness that the plaintiffs  
17 have not disclosed to me under Rule 26 those are the  
18 witnesses. They have no knowledge of the identity of the  
19 person or at least at the time they were deposed who attacked  
20 them and there are no documents indicating who did it or how  
21 the PA or the PLO might have supported the persons who did.

22 MR. TOLCHIN: The motion --

23 THE COURT: Well, the bottom -- okay, Counsel, the  
24 bottom line is this. It does appear to me that the defendants  
25 have called into question whether or not there was a good

1 faith basis for the allegations in those paragraphs. To the  
2 extent that they called the entire paragraph into question it  
3 cannot be remedied by taking Abu Halawa out of the equation  
4 because indeed as even the plaintiff concedes we're talking  
5 about something broader than this individual. So whether or  
6 not he's identifying -- whether or not he's implicated the  
7 question still remains as to whether or not the allegations --  
8 remember, we're talking about the two defendants in this case  
9 being one of the -- well, two of the defendants in this case  
10 being the Palestine Liberation Army and the PA.

11 If you're going to have paragraphs in your complaint  
12 implicating them the other side has a right to the basis for  
13 those allegations and in addition the plaintiffs in writing  
14 their complaint have to have a good faith basis for making  
15 those allegations. You're right, Mr. Tolchin, that you can  
16 prove it in many different ways but you have to know what  
17 those ways are at the time you made the complaint.

18 MR. TOLCHIN: What you have to have is a good faith  
19 basis to believe that these facts can be established.

20 THE COURT: And there has to be some objective reason  
21 for that good faith basis.

22 MR. TOLCHIN: Correct. Just to be clear, you don't  
23 need to have your -- you don't need to have your whole direct  
24 case ready. You need to have a good faith basis to believe  
25 that what you're alleging will be established with the aid of

1 discovery.

2 THE COURT: Right. Just so that we're on the same  
3 page, you have to have -- a good faith basis has to be based  
4 on something objective, not whether or not you think that the  
5 PLO and the PA are involved in all of this. I can't -- you  
6 understand you can't just think that they're bad actors and  
7 therefore you have a belief that they're involved. There has  
8 to be something objective that you need to present to me, not  
9 your personal belief or that you think they're bad and they're  
10 involved in a lot of stuff.

11 MR. TOLCHIN: Okay.

12 THE COURT: I think that -- go ahead.

13 MR. TOLCHIN: The proposed motion that they've -- I  
14 keep coming back to this. The proposed motion that they've  
15 proposed filing is regardless of how Mr. Hill tries to recast  
16 it now. If you read it it talks only about the Abu Halawa  
17 link and how without Abu Halawa all of this goes and we said  
18 no, we withdraw the claim about Abu Halawa but the rest of the  
19 allegations we're standing on.

20 The focus of their motion if you delete -- if you go  
21 with a redacting pen and black marker and cross out every Abu  
22 Halawa the rest of the motion makes no sense.

23 THE COURT: Mr. Tolchin, I think -- I'm not sure  
24 whether you are necessarily reading -- listening now to Mr.  
25 Hill but what Mr. Hill said is -- and again if this is

1 incorrect you can correct him but he said he tried to find out  
2 the basis for the allegations in those paragraphs. The only  
3 thing that you put forth were two witnesses who did not seem  
4 to support it. The paragraphs not only talk about Abu Halawa  
5 but the link between these actions and the PLO and the PA hit  
6 what -- his point is is that you haven't given him any  
7 [inaudible] for what's in Paragraph 55 making the PLO and the  
8 PA. Nobody testified to it.

9 At this point as far as I can tell Mr. Hill has no  
10 idea what evidence you will present at trial to satisfy the  
11 allegations in Paragraphs 55 through 58 and 60.

12 MR. TOLCHIN: I can't believe that. I can't believe  
13 he has no idea, Your Honor. Just to start with, what Mr. Hill  
14 said -- he was saying we put forth two witnesses. Even that  
15 is a sneaky substitute. The two witnesses were the victims of  
16 the attack, crime victims. People who had guns put in their  
17 face and were shot at. Now, is it really reasonable for Mr.  
18 Hill to be saying that we asked them do you know if the  
19 organizational structure of the defendants and who sent out  
20 these people who attacked you and they said they didn't know.  
21 Is that even an intelligent thing to -- an intelligent  
22 argument to make? Of course they don't know. You wouldn't  
23 expect them to know. Nobody would. It's absurd to even say  
24 that.

25 THE COURT: Aren't these the same --

1 MR. TOLCHIN: Obviously this case -- what?

2 THE COURT: Aren't these the same people that you  
3 represented these things were indelibly marked in their minds?

4 MR. TOLCHIN: One of them. One of them and actually  
5 identification that we had. But even so I mean [inaudible]  
6 from there. She can't link that man to the PLO. She can't  
7 link that man to the PA. She just says I see that picture and  
8 that's him. That's the maximum evidence she could ever give.  
9 It's the maximum evidence anyone could suspect, could ever  
10 expect her to give. Linking him to the defendants showing  
11 that this attack and attacks like this were part of their  
12 pattern and practice and their modus operandi at the time,  
13 that the people who were caught doing these attacks were all  
14 found to be linked to the defendants, she can't know any of  
15 that. She can't know the -- anything about how the defendants  
16 encouraged people to go out and do exactly attacks like this,  
17 about how people who did attacks like this in this location  
18 had streets named after them and holidays and were given  
19 prizes and their families were given awards, rewards,  
20 financial payment, how people who got arrested for doing  
21 attacks like this are getting pensions from the defendants  
22 that they call martyr payments.

23 THE COURT: Well, I --

24 MR. TOLCHIN: How can the plaintiffs know anything  
25 about that?

1 THE COURT: I --

2 MR. TOLCHIN: [Inaudible] the rest of the case.

3 THE COURT: But if I understand you correctly the  
4 issue here isn't whether or not any particular individual  
5 who's put forth as a witness can make the link that you're  
6 talking about but the question is what evidence do you have to  
7 support the allegations that are in those paragraphs. It  
8 sounds to me as if you're saying that the evidence you have is  
9 that it's pattern and practice.

10 MR. TOLCHIN: That's a lot of it but I'm saying that  
11 the way to deal with this is make a motion for summary  
12 judgment if you don't think we don't have the evidence. We'll  
13 oppose the motion and you'll see exactly what our case is. To  
14 [inaudible] the Rule 11 motion is -- it's not -- I can't tell  
15 you more clearly. It's not constructive. If they had a  
16 problem with this complaint as a pleading matter the time to  
17 address it was ten years ago when my predecessor counsel filed  
18 this complaint.

19 THE COURT: Okay. Mr. Tolchin --

20 MR. TOLCHIN: That's when they moved to --

21 THE COURT: Mr. Tolchin, let's be clear. If you --  
22 and again these are discovery issues. If the defendant asked  
23 you what witnesses or evidence you have to support the  
24 allegations in the complaint that's reasonable discovery. If  
25 you don't put anything forward to support it they have a right

1 to know the basis for the allegations in the complaint.  
2 That's not a summary judgment issue. That's contention. If  
3 you make a contention the other side has a right to know the  
4 basis for the contention. It could overlap some of the issues  
5 in summary judgment but I'm still not sure what it is that  
6 you -- what transpired between the parties with regard to the  
7 support for the allegations in Paragraphs 55 through 58 and  
8 60. I take it there was --

9 MR. TOLCHIN: Your Honor, I don't think we disagree.  
10 I think they're saying the same thing perhaps in different  
11 ways. As I see it the purpose of discovery demands including  
12 contention interrogatories and the like is that now when they  
13 make their motion for summary judgment they will presumably  
14 tell the court we asked this question, this is the answer we  
15 gave and here's why we don't think it's a case and we'll  
16 respond saying no, it is a case and here's why. The Rule 11  
17 motion is something completely different. They're saying ten  
18 years ago when your predecessor counsel filed this complaint  
19 what did you know that made you think that this was a viable  
20 allegation.

21 THE COURT: Okay.

22 MR. TOLCHIN: Two or there motions to dismiss  
23 vacating a default judgment, all this discovery down the road  
24 and on the brink of summary judgment coming back to an  
25 allegation in a ten year old pleading just is not

1 constructive. I don't see why they're pursuing -- why they're  
2 pressing this point.

3 THE COURT: Just to be clear, Mr. Tolchin, you said a  
4 number of things and I'm not sure where we are. At one point  
5 I think your response to defendants was that some of the  
6 information you relied on was privileged and in a large part  
7 of the presentation you just made you're suggesting that this  
8 information is part of a pattern and practice which when  
9 you --

10 MR. TOLCHIN: The naming of Abu Halawa was based on a  
11 privileged communication. That's what we said was privileged.

12 THE COURT: Okay.

13 MR. TOLCHIN: Why did we name Abu Halawa specifically  
14 was based on that.

15 THE COURT: Okay.

16 MR. TOLCHIN: Me personally I'll be candid. If I  
17 were filing this complaint, if I were the lawyer who drafted  
18 the complaint, I would probably have left out specific names.  
19 I would have just said the defendants and their agents,  
20 servants and employees but --

21 THE COURT: Well, and I might have done the same  
22 thing but -- so if I understand correctly though, if you or I  
23 had filed the complaint and it said their agents then the  
24 question would be -- forgetting for the moment the part that  
25 talks about Halawa, the part that becomes important for



1 discovery purposes is this phrase. Acting pursuant to the  
2 authorization, instructions, solicitation and directive of the  
3 PLO and the PA and within the scope of their -- okay. Just  
4 that part. There's been no discussions or requests from the  
5 parties that address that portion of 55 for example.

6 MR. TOLCHIN: That's not correct. There's been  
7 plenty. That is the main theme for example of our expert's --  
8 aiming theme of our expert's reports. We have developed much  
9 evidence. Some of it, in fact much of it produced by the  
10 defendants after the close of discovery when they produced  
11 almost all of the discovery they provided us came after the  
12 close of discovery. Much evidence of the payments to these  
13 criminals, pensions paid to these criminals, employment  
14 records showing that these criminals worked for them. We have  
15 videos of agents and servants and employees of defendant's  
16 [inaudible] people to go out and do things like this, praising  
17 people who did things like this. Certainly not saying stop  
18 doing this.

19 THE COURT: Okay.

20 MR. TOLCHIN: Leaving things around on TV saying --

21 THE COURT: Mr. Tolchin --

22 MR. TOLCHIN: -- only by killing by Jews that we  
23 will -- we were being --

24 THE COURT: Mr. Tolchin. Mr. Hill, I'm sure you've  
25 been listening to this attentively.

1 MR. HILL: I have, Your Honor.

2 THE COURT: It sounds to me as if much of what forms  
3 the basis for the paragraphs that are in dispute concerning  
4 how it implicates the PLO and the PA is not going to be -- was  
5 not based on individual information but as Mr. Tolchin calls  
6 it pattern and practice, is it your position that you've asked  
7 these questions and you either were unaware that this was the  
8 basis for the allegations or do you think that it's an  
9 improper basis for the allegation? I'm not sure what your  
10 position is.

11 MR. HILL: It would be the latter, Your Honor. We  
12 did ask in an interrogatory which we had to get Your Honor to  
13 order them to answer which said state the factual basis for  
14 your contention in Paragraph 60 of the first amended complaint  
15 that the January 8, 2001 shooting "was planned and carried out  
16 by Abu Halawa and the John Doe defendants acting as agents and  
17 employees of the PA and PLO and within the scope of their  
18 agency and employment pursuant to the prior authorization,  
19 instructions, solicitations and directions of defendants PLO  
20 and PA in furtherance of the goals and policies of defendants  
21 PLO and PA and using funds, weapons, means of transportation  
22 and communication and other materials, support and resources  
23 supplied by defendants PLO and PA for the express purpose of  
24 carrying out this attack and terrorist attacks of this type."

25 The answer we got was in response to this

1 interrogatory plaintiffs state number one, that Mrs. Guetta  
2 has identified Fazi Maurar as her attacker; two, that officers  
3 and employees of the PA security and police forces carried out  
4 numerous attacks on Jewish and Israeli civilians in the same  
5 are during the same time period using the same modus operandi;  
6 three, that additionally in order to avoid repetition  
7 plaintiff hereby incorporates by reference their answers to  
8 Interrogatories 13 to 14 and 15 to 18 above which don't add  
9 anything to what I've just read.

10           So the two prongs in the interrogatory to support  
11 Paragraph 60 which is one of them at issue is the  
12 identification, the alleged identification of Mr. Maurar and  
13 the sort of evidence Your Honor was talking about earlier that  
14 they think we're generally bad people who have done bad stuff,  
15 and our position is at the time they filed the complaint they  
16 did not have this alleged identification of Mr. Maurar. So  
17 that could not have formed the basis on which to base the  
18 complaint and as Your Honor remarked earlier it's not enough  
19 to just think the defendant is bad and therefore you sue them  
20 for a tort, let alone an intentional tort like violating the  
21 anti-terrorism act.

22           So we would request that the court require the  
23 plaintiffs to submit in camera if they claim it's actually  
24 privileged the information that they had at the time they  
25 filed the complaint on which they base the allegations in

1 Paragraphs 55 to 58 and 60 and Your Honor can look at that ex  
2 parte if you have to to determine whether or not there was in  
3 fact an objective good faith basis to sue my clients and  
4 require us to go through the ten years of litigation, not to  
5 mention the burden that it's been on the court for the last  
6 ten years. That's the purpose of Rule 11 is to prevent people  
7 who don't have an objective good faith basis from hailing a  
8 defendant into court and requiring them to defend themselves  
9 against frivolous allegations from doing so and we  
10 respectfully submit that we've made at least an initial  
11 showing required to get Your Honor to take a look at this and  
12 see whether or not the plaintiffs actually complied with their  
13 Rule 11 obligation and if they didn't we'll leave it to the  
14 court to fashion an appropriate sanction but we think it is at  
15 least stopping this portion of the case from continuing any  
16 further since it appears to be based nothing more -- on  
17 nothing more than the animus of the defendants towards the  
18 defendants.

19 THE COURT: Okay. Well, I hear what you're saying  
20 although I have to tell you I've gotten a different message  
21 from the plaintiff than you've gotten. While I share your  
22 concern about the Maurar issue as to whether or not that's a  
23 basis, it seems fairly clear to me that basically what the  
24 plaintiffs are relying on it's more than just simple animus.  
25 It may not rise to the level of proof that the court might

1 find compelling but I do understand what it is that Mr.  
2 Tolchin is saying.

3 MR. HILL: Well, what it says to me to be saying,  
4 Your Honor, and maybe I misheard him, is that he thinks other  
5 crimes were committed by people associated with my client.  
6 The fact that other people associated with my clients may have  
7 committed other crimes is not a Rule 11 objective basis to  
8 believe that they committed this crime.

9 THE COURT: Okay. I thought he was saying more than  
10 that but again let's -- let's do this -- first of all, he did  
11 not say that what he would be submitting to me on this was  
12 just the privileged information because he said that was  
13 only -- that only had to do with Abu Halawa.

14 As to the basis for the other allegations in the  
15 complaint linking the PLO and the PA it's a much broader  
16 pattern and practice which involves not only actions that took  
17 place in similar circumstances but experts who will talk  
18 about -- you have the expert reports I suppose. I don't know  
19 if these are the same experts that Mr. Tolchin is talking  
20 about but it's more than just bad animus and I have no reason  
21 to believe that any attorney would just say they did bad  
22 things and -- over in this location; therefore he must have  
23 done bad things here.

24 So what you're asking is not for me to look at  
25 something which is simply privileged but to basically

1 determine whether or not the information that the plaintiffs  
2 have put together concerning any link to the PA and the PLO is  
3 sufficient as a legal matter. As I've listened to this the  
4 one thing that -- the one conclusion I've come to is that Mr.  
5 Tolchin is probably right that this is -- the testing of  
6 whether or not the information that the plaintiffs put forth  
7 as support for the PLO and the PA link probably works better  
8 when all of the evidence is considered in a dispositive motion  
9 because I think based upon what I've heard a lot of what the  
10 plaintiffs are setting forth has to do with what reasonable  
11 inferences can be made from the similarities, the context of a  
12 number of different things happening.

13           As I said before, you can't just say they're bad  
14 actors and therefore every bad act gets attributable to them.  
15 I know sometimes people think the police do that and they  
16 filed every crime that's remotely linked to somebody that they  
17 pick up. But I understood Mr. Tolchin to be saying something  
18 broader and more intricate in terms of its proof. Whether or  
19 not that suffices as a matter of law for proof that's a  
20 different question as to whether or not a lawyer having that  
21 kind of information is justified in putting it in the  
22 complaint.

23           It's not a simple matter of them submitting  
24 something to me in camera because as I understand it we're  
25 talking about a more complicated nuance putting together links

1 from A, B and C and having somebody tell you why all those  
2 links make sense. We're not going to have, for example, an  
3 evidentiary hearing in which somebody is going to point these  
4 things out to me, not for this Rule 11 issue.

5 MR. HILL: Your Honor, so I'm not quite sure where we  
6 are. Are you -- have you made a ruling or are we having a  
7 discussion at this point? I'm not quite sure what the next  
8 step is in the process.

9 THE COURT: Well, my ruling is this. Based upon what  
10 Mr. Tolchin has said concerning the basis for the allegations  
11 in those paragraphs of the complaint one, it's not a simple  
12 matter of presenting something to me for in camera review.  
13 Secondly, the basis for those allegations are tied into the  
14 total evidentiary proof that the plaintiffs intend to make  
15 concerning the link between the PA, the PLO and the incidents  
16 which they have attributed to them. That involves a mini  
17 trial and it seems to me that's inappropriate for -- to have a  
18 mini trial on the adequacy of their proof prior to you having  
19 a trial or any motion.

20 So I think to the extent that a lawyer has a --  
21 whether you call it a pattern and practice or an expert to say  
22 why it's reasonable to believe that acts done by actor A or  
23 attributable to entity B and C, that's not -- if you have that  
24 kind of complexity it seems to me it would be difficult to  
25 make out a case that it should not be -- if the basis for a

1 Rule 11 sanction for putting it in the complaint. So I don't  
2 see this as playing out as a Rule 11 sanction.

3 MR. HILL: Your Honor, if I could just be heard on  
4 one distinction that may have been lost in the course of our  
5 conversation here. The issue of course is whether there was  
6 an adequate factual basis at the time the complaint was filed.  
7 I have not yet seen the expert reports that links the PA and  
8 the PLO to the attack on Mr. and Mrs. Guetta. If it's  
9 forthcoming I haven't got it yet. But that report did not  
10 exist when this was filed in 2004.

11 So our point is that we should not have got to this  
12 point and that's what Rule 11 is designed to protect a party  
13 against. It's not a situation where if you pick a defendant  
14 who happens to be liable without a basis and you file a  
15 complaint and then discover a basis in liability that you  
16 never [inaudible] proceed to judgment against that defendant  
17 which is the hypothesis that Mr. Tolchin is apparently  
18 spinning out here. It is rather the case that the defendant  
19 is entitled to not be put through the process and the purpose  
20 of Rule 11 is to require the court to police plaintiffs and  
21 make sure that they have a good faith basis for the  
22 allegations in the complaint.

23 The plaintiffs have admitted that they have no  
24 evidence, or at least no evidence they will share that  
25 connected the PA and the PLO to this attack at the time that



1 the complaint was filed. They did not have the ID of Mr.  
2 Maurar. That's obvious because when I asked the plaintiffs  
3 about it they said they didn't have it. So they claim to have  
4 an ID of somebody else which they've now retreated from and  
5 withdrawn.

6           So I think it's only fair to the defendants and  
7 frankly to the court -- you spent a lot of time dealing with  
8 this issue -- that the plaintiffs be required to make the  
9 minimal demonstration that at the time they filed the  
10 complaint they had a good faith basis to believe the PA and  
11 the PLO were connected to this attack. That's what I would  
12 ask the court to allow us to do either by requiring the  
13 plaintiffs to submit, which shouldn't be very much stuff  
14 frankly, to Your Honor to look at in camera if Your Honor  
15 prefers or allow us to make the motion and they can respond  
16 and put on the record what information they had at the time  
17 they filed the complaint that they believed constituted a good  
18 faith basis.

19           THE COURT: Well, I hear what you're saying although  
20 as you say it in the context of this case you understand that  
21 any time a lawyer puts something in a complaint that may  
22 require expert testimony you could make the same complaint  
23 you're making now.

24           MR. HILL: Yes, Your Honor, but you're not going to  
25 be able to [inaudible] the case based only on expert

1 testimony.

2 THE COURT: But what I'm saying though is if a lawyer  
3 believes that -- I mean let's state it starkly for this case.  
4 If you look at an incident and you talk with some individuals  
5 who may say this fits the pattern of some of the other cases,  
6 we think we'll be able to prove when we analyze it that it's  
7 part and parcel of the modus operandi. Are you suggesting  
8 that that would be a Rule 11 violation?

9 MR. HILL: Yes, Your Honor, particularly in the  
10 context of this case where the plaintiff testified that she  
11 could not tell whether her attackers were Israeli or  
12 Palestinians. The notion that other crimes have been  
13 committed by other people and therefore these defendants are  
14 liable is not a sufficient Rule 11 basis to sue these  
15 defendants.

16 THE COURT: But, again, what you suggested as the  
17 problem I don't see as a problem. I don't think this is based  
18 on the identification.

19 MR. HILL: I disagree, Your Honor. I think the  
20 reason Abu Halawa is in the complaint is because the plaintiff  
21 had someone tell them in what they claim is a privileged  
22 conversation which by the way I don't see how it could  
23 possibly be privileged given the fact that it obviously didn't  
24 come from their client that Abu Halawa did it. It was on the  
25 basis of that communication with who knows who that the

1 complaint was filed. That's what the record has shown us so  
2 far.

3 THE COURT: We're listening to something different.  
4 It was not my understanding -- I mean that might have been the  
5 shorthand easy way for somebody to throw in something which  
6 they thought would bolster their case. It wound up causing a  
7 whole bunch of problems but it seems to me that that in and of  
8 itself would be a rather weak basis for making this broad  
9 allegation against the PA and the PLO.

10 What I've heard Mr. Tolchin say today is that  
11 whether you agree with him or not is he's talking about an  
12 analysis of pattern and practice of doing certain things in a  
13 certain way and certain targets. So I don't see the  
14 identification of a particular individual as essential to the  
15 ultimate conclusion that there's a link between the PLO and  
16 the PA and these crimes. As I said, I know lawyers often  
17 draft things in a way and it gets us off target but I don't  
18 doubt that somebody in drafting the complaint said okay, we  
19 have somebody who is a PA member. Somebody said he was  
20 involved. Let's put him in and that will implicate the PA but  
21 that's not the essence of what we're talking about here.

22 MR. HILL: Since that was the only thing in the  
23 complaint and until February was the only piece of evidence  
24 linking either of my clients to the attack that's why I'm  
25 urging the court to test the veracity of the claim that there

1 was a good faith basis at the outset of the case because that  
2 was it, Your Honor. Until we sent the Rule 11 letter and got  
3 this unsworn identification of Mr. Maurar the only link  
4 between our client and this attack was this alleged  
5 identification of Mr. Abu Halawa which the plaintiffs  
6 themselves admitted was incorrect and that they had no  
7 evidence of it.

8 THE COURT: And if that's all that they have then it  
9 would be -- it would be -- that would be a problem in any case  
10 if that's all they had but that's not what Mr. Tolchin said in  
11 this conversation. He said that they -- it's -- there are  
12 other link and other dots that are connected and some of it  
13 has to do with -- now, if you're telling me that you haven't  
14 seen anything, any expert reports --

15 MR. HILL: That's correct, Your Honor. No such  
16 links, no such dots have been produced us.

17 THE COURT: What -- I'll certainly give you the  
18 benefit of not -- of doing anything I do without prejudice but  
19 what Mr. Tolchin says is that part and parcel of their proof  
20 will be that they will have to show that there's a link  
21 between the PLO and the PA. They'll do it by any number of  
22 means which don't have to do with somebody identifying a  
23 member of the PA and the PLO as participating in any  
24 particular act. If that turns out not to be the case at least  
25 until this case ends you can bring your motion for sanctions.

1 MR. HILL: Okay. Thank you, Your Honor.

2 MR. TOLCHIN: Your Honor, this is Bob Tolchin.

3 THE COURT: Yes.

4 MR. TOLCHIN: I don't -- it's a little forward of me  
5 but I didn't anticipate this call to be this long and I'm  
6 supposed to be on another call with another judge at eleven.

7 THE COURT: Somebody --

8 MR. TOLCHIN: I put that out there. If we're near  
9 done --

10 THE COURT: We are near -- I've just told Mr. Hill  
11 that -- based on your representations that there will be other  
12 forms of proof linking a PA and the PLO I don't see a basis  
13 for going forward with Rule 11 sanctions but that is -- if it  
14 turns out that you come across with some weak stuff when put  
15 to the test of proving it I'll entertain a motion for  
16 sanctions.

17 MR. HILL: Thank you, Your Honor. We've [inaudible]  
18 call as far as I can --

19 MR. TOLCHIN: The odd thing is that the sanction  
20 they're seeking is dismissal of the claim and I suppose if we  
21 come up with something so weak that it would be sanctionable  
22 they would have no problem getting dismissal of the claim on  
23 the motion for summary judgment.

24 THE COURT: No, but they'll get some monetary --

25 MR. TOLCHIN: They haven't asked for monetary. Well,

1 the only relief they've asked for is a sanction in the form of  
2 dismissing the claim.

3 MR. HILL: That's not correct, Your Honor. We have  
4 asked for a monetary sanction because this has been ten years  
5 of litigation that our clients --

6 MR. TOLCHIN: It has not been ten years of  
7 litigation. You were in default for most of the ten years.

8 THE COURT: Counsel --

9 MR. TOLCHIN: Let's not keep exaggerating that.

10 THE COURT: -- the issue is whether or not they get  
11 monetary sanctions. I suggest you look at what was -- because  
12 they can certainly -- if we go back and it turns out that all  
13 of this was baseless then I'll consider it.

14 MR. HILL: Thank you, Your Honor.

15 MR. TOLCHIN: I appreciate that, Your Honor.

16 THE COURT: We're adjourned.

17 MR. TOLCHIN: Brian, I'll call you about in 20  
18 minutes about that other thing.

19 MR. HILL: Okay.

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1 I certify that the foregoing is a court transcript from  
2 an electronic sound recording of the proceedings in the above-  
3 entitled matter.

4  
5 \_\_\_\_\_  
6 Shari Riemer

7 Dated: April 6, 2013  
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